Leong Wan Ying & Anor v Abdul Jabbar bin Abdul Majid & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–400–1991
HARUN HASHIM, PEH SWEE CHIN AND WAN YAHYA SCJJ
6 MAY 1994

Companies and Corporations *— Receivership —Application by receiver and manager to sell property by private treaty despite interim injunction — Whether there were special circumstances*

Land Law *— Order for sale — Application by receiver and manager to sell property by private treaty despite interim injunction — Whether there were special circumstances*

The appellants were two of the shareholders in a company ('Lemo'). In 1980, Lemo obtained a loan from Bank Pertanian Malaysia ('the Bank') to develop certain land, which were alienated to them by the state authorities, as an oil palm plantation. The loan facilities were secured by two debentures in addition to a charge on the land. Lemo entered into an agreement with Nestra Plantations Sdn Bhd ('Nestra') for the sale of their shares in the company. Nestra failed to pay the full purchase price for the shares resulting in the appellants suing Nestra for the purchase price of the shares. This suit ('the suit') has yet to be heard.

In 1985, the appellants applied to the court in the suit for an order that the Official Receiver be appointed as receiver of assets and undertakings of Lemo and to manage Lemo with a view to its continuance as a going concern until judgment in the suit and the High Court so ordered. On appeal by Nestra and Lemo, this court vacated the order and granted an interim injunction to prevent anyone from dealing with Lemo's land until final disposal of the suit.

In 1988, receivers and managers ('the respondents') were appointed by the Bank as a result of Lemo's default in not servicing the loans. And in 1989, the respondents applied to the High Court at Kuala Lumpur for leave to lease, grant licence or to sell the land at such price and in such manner as the respondents think fit. On 9 September 1991, the High Court allowed the application. The appellants have appealed.

Held, allowing the appeal:

(1) The trial judge was premature in his finding that the appellants had no locus standi to object to the application because they had ceased to be shareholders of Lemo, as it was an issue of fact and law to be decided in the suit. Further, the appellants remained the plaintiffs in the suit and were also parties in the interim injunction issued by this court.

(2) Whilst it is true that the interim injunction made provision for the respondents to apply for leave to sell the land by private treaty,

the primary purpose of the injunction was that the status quo be preserved until the final disposal of the suit. The leave provision was included for special circumstances that may arise. Both in the court below and here, there were no special circumstances that would justify granting the leave which would in effect result in dissolving the injunction.

(3) The appeal was allowed with costs and the order of the High Court of 9 September 1991 was set aside and the injunction of this court to continue to remain in force until the final disposal of the suit.

[Bahasa Malaysia summary

Perayu merupakan dua orang pemegang saham di dalam sebuah syarikat ('Lemo'). Dalam tahun 1980, Lemo telah memperolehi satu pinjaman daripada Bank Pertanian Malaysia ('Bank itu') untuk membangun tanah tertentu, yang telah diberimilik kepada mereka oleh pihak berkuasa negeri, sebagai ladang kelapa sawit. Pinjaman kemudahan itu telah dicagar oleh dua debentur dan juga suatu gadaian atas tanah itu. Lemo telah mengikat suatu perjanjian dengan Nestra Plantations Sdn Bhd ('Nestra') untuk menjual saham mereka di dalam syarikat itu. Nestra telah gagal membayar harga belian penuh saham itu dan akibat itu, perayu telah mendakwa Nestra untuk harga belian saham itu. Guaman ini ('guaman itu') masih belum dibicarakan.

Dalam tahun 1985, perayu telah memohon kepada mahkamah di dalam guaman itu untuk mendapat suatu perintah supaya Pegawai Pemegang Harta dilantik sebagai penerima aset dan kerja Lemo dan menguruskan Lemo supaya ia boleh berjalan sehingga penghakiman dibuat di dalam guaman itu dan Mahkamah Tinggi telah mengarahkan demikian. Atas rayuan Nestra dan Lemo, mahkamah ini telah membatalkan perintah itu dan telah memberikan suatu injunksi interim untuk menghalang sesiapa daripada berurus dengan tanah Lemo sehingga penyelesaian muktamad guaman itu.

Dalam tahun 1988, penerima dan pengurus ('responden') telah dilantik oleh Bank itu kerana Lemo telah gagal membayar faedah atas pinjaman itu. Dan dalam tahun 1989, responden telah memohon kepada Mahkamah Tinggi di Kuala Lumpur untuk kebenaran memajak, memberi lesen atau menjual tanah itu pada harga dan dengan cara yang difikirkan sesuai oleh responden. Pada 9 September 1991, Mahkamah Tinggi telah membenarkan permohonan itu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Hakim perbicaraan bertindak pramasa apabila memutuskan bahawa perayu tidak mempunyai locus standi untuk membuat bantahan terhadap permohonan itu kerana mereka tidak lagi menjadi pemegang saham Lemo, kerana ia merupakan suatu isu fakta dan undang-undang yang sepatutnya diputuskan di dalam guaman itu. Lebih-lebih lagi, perayu masih lagi merupakan plaintif

A di dalam guaman itu dan juga merupakan pihak di dalam injunksi interim yang telah diberi oleh mahkamah ini.

(2) Walaupun ianya benar bahawa injunksi interim itu membolehkan responden memohon untuk mendapat kebenaran untuk menjual tanah itu melalui triti persendirian, tujuan utama injunksi itu adalah supaya status quo dikekalkan sehingga guaman itu diselesaikan. Peruntukan untuk mendapat kebenaran itu dimasukkan untuk keadaan khas yang mungkin timbul. Di dalam mahkamah bawah dan juga di sini, tidak terdapat keadaan khas yang akan menjustifikasikan pemberian kebenaran itu yang akan mengakibatkan injunksi itu dibubarkan.

(3) Rayuan itu dibenarkan dengan kos dan perintah Mahkamah Tinggi pada 9 September 1991 itu diketepikan dan injunksi mahkamah ini diteruskan sehingga guaman itu selesai.]

Appeal from: Originating Summons No D2–24–134–1989 (High Court, Kuala Lumpur)

M Nagarajah (*Dzulqarnaine Abu Bakar* with him) (*Shook Lin & Bok*) for the appellants.

Izabella de Silva (*Chooi & Co*) for the respondents.

Cur Adv Vult

Harun Hashim SCJ (delivering the judgment of the court): In 1979, the state authority of Terengganu alienated 1,000 acres of land to Lemo Sdn Bhd ('Lemo') for the cultivation of oil palm. In the same year, the state authority conditionally approved a further 1,000 acres for the same purpose upon satisfactory completion of planting the first 1,000 acres.

The shareholders of Lemo were:

Leong Wan Ying @ Leong Mun Ying	—	49%
Mohamed bin Abu Bakar	—	30%
Hashim bin Ismail	—	18%
Dato Haji Wan Hassan bin Abdul Halim	—	3%

In 1980, Lemo obtained a loan of RM4.1m from Bank Pertanian Malaysia ('the Bank') to develop the land as an oil palm plantation. The loan facilities were secured by two debentures dated 19 August 1980 and 16 December 1982, respectively, in addition to a charge on the land.

On 8 April 1981, Leong, Mohamed and Hashim entered into a sale and purchase agreement with Nestra Plantations Sdn Bhd ('Nestra') for the sale of all their respective shares amounting to 485,000 out of 500,000 issued shares. The authorized capital of Lemo was then RM4m, divided into 4,000,000 ordinary shares of one ringgit each. The purchase price of the 485,000 shares was RM2,813,000.

The sale and purchase agreement provided for 10% of the purchase price to be paid to the vendors on the execution of the agreement and the balance in equal instalments over a period of 4½ months. Nestra failed to

pay the full purchase price for the shares resulting in Leong and Hashim suing Nestra in Seremban High Court Civil Suit No 250/81 for the purchase price of the shares. This suit has yet to be heard.

By the end of 1984, the 2,000 acres had been fully planted except for 55 acres, including land set aside for nursery and buildings. The plantation is the only asset of Lemo. In 1985, the indebtedness of Lemo was RM5.6m and it was attempting to create a second charge for the purpose of borrowing a further RM1.4m, although the plantation was already generating income from its mature acres.

On 2 September 1985, Leong and Hashim applied to the court in the Seremban suit for an order that:

(1) The Official Receiver without giving security or some other person on giving security be appointed as receiver of assets and undertakings of Lemo Sdn Bhd and to manage Lemo Sdn Bhd with a view to its continuance as a going concern until judgment in this action.
(2) The defendant do forthwith deliver to the receiver so appointed all the stock in trade and effects of the business together with all deeds, documents, books and papers relating thereto of Lemo Sdn Bhd.

In the event, on 18 March 1986, the High Court ordered:

> That the Official Receiver, Malaysia be and is hereby appointed with immediate effect as receiver and manager without giving security of the assets and undertaking of Lemo Sdn Bhd and to manage Lemo Sdn Bhd with a view to its continuance as a going concern until judgment in this suit.
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> And it is ordered that Haji Marzuki bin Razalli do continue as the plantation manager but the Official Receiver be at liberty to apply in regard thereto.
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> And it also ordered that the defendants do forthwith deliver to the Official Receiver so appointed all the stock in trade and effects of the business together with all deeds, documents, books and papers relating thereto to Lemo Sdn Bhd.

On appeal by Nestra and Lemo, this court, by consent, on 20 August 1986, vacated the order and ordered that:

> The appellants Nestra Plantation Sdn Bhd and Lemo Sdn Bhd shall not without the leave of the High Court whether by themselves, their servants, agents or directors or howsoever sell, transfer, charge, lease or otherwise deal in or encumber the land held under RS (D) Kemaman 398 for PT757P in the Mukim of Tebak, District of Kemaman, State of Terengganu until the final disposal of Seremban High Court Suit No 250 of 1981. And it is further ordered that the appellants do pay to the respondents the costs of this appeal to be taxed by a proper officer of the court. And it is further ordered that the sum of RM500 (Ringgit five hundred only) deposited into court by the appellants as security for costs of this appeal be paid out to the respondents to account for taxed costs And it is further ordered that the terms of this order shall not apply to the charge in escrow created by Lemo Sdn Bhd on 19 August 1980 over the second phase of its plantation described in recital (v) of the sale and purchase agreement dated 8 April 1981 between the first appellant of the one part and the respondents of the other part. And it is lastly ordered that the parties be at liberty to apply.

On 11 May 1989, the receivers and managers of Lemo applied to the High Court at Kuala Lumpur for leave to lease, grant licence or to sell the land at such price and in such manner as the receivers and managers think fit.

A On 9 September 1991, the High Court granted the aforesaid application. It is against this order that Leong and Hashim have appealed to this court.

The receivers and managers of Lemo were appointed by the Bank on 21 October 1988 pursuant to the powers contained in the two debentures as a result of Lemo's default in not servicing the loans. The application to the court to deal with the land in the manner proposed and approved by the B court is in accordance with the terms of the debentures. The application, however, had to be made in view of the interim injunction of this court.

Leong and Hashim (the appellants) object and now appeal against the order on the grounds that Nestra, as purchasers of the Lemo shares under the 1981 sale and purchase agreement, were in default of the agreement C and had sought relief in the Seremban High Court for a declaration that the said agreement is null and void, repudiated, terminated and for the return of the share certificates and instrument of transfer of shares held by the common solicitors in escrow and whilst the suit was pending, the High Court had appointed the Official Receiver to safeguard the only asset (the land) of Lemo. As previously observed, this appointment has since been D vacated by the consent order of this court, but the Seremban suit is still pending. There have been several intervening applications including the fact that one of the parties had been adjudged bankrupt and Lemo itself had been wound-up by order of court on 28 February 1993.

The learned trial judge held that the appellants had no locus standi to E object to the application because they had ceased to be shareholders of Lemo. We are of view that this finding is premature as it is an issue of fact and law to be decided in the Seremban suit. Further, the appellants still remain the plaintiffs in that suit and are also parties in the interim injunction issued by this court.

The learned judge further held, inter alia, that the granting of leave to the F respondents to sell the land by private treaty will not be in breach of the Supreme Court injunction. Whilst it is true that the injunction makes provision for the respondents to apply for such leave, the primary purpose of the injunction should be taken into consideration, viz that the status quo be preserved until the final disposal of the Seremban suit. The leave G provision was included for special circumstances that may arise. Both in the court below and before us, there were no special circumstances that would justify granting the leave which will in effect result in dissolving the injunction. Several other issues were raised in this appeal but in our judgment, on this ground alone, the appeal should be allowed.

For the reasons stated, we allow the appeal with costs here and below. H The order of the High Court dated 9 September 1991 is set aside and the injunction of this court to continue to remain in force until the final disposal of the Seremban suit.

Deposit to be refunded to the appellants.

Appeal allowed.

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Reported by Prof Ahmad Ibrahim